

**Before the  
FEDERAL COMMUNICATIONS Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Transforming the 2.5 GHz Band	)	WT Docket No. 18-120
	)	

**COMMENTS OF  
THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL**

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## SUMMARY

In WCA's view, the Commission's approach to the issues presented by the *Notice* should be guided by three overarching principles:

***First, the highest and best use of the 2.5 GHz band today is for the provision of commercial broadband services.*** The stark reality – one which will no doubt be ignored by those urging the Commission to retain a spectrum reservation for educators – is that the overwhelming majority of EBS licensees lease the maximum capacity of their spectrum permitted under Commission rules (95 percent) for commercial use, allow commercial operators to construct networks using all of their spectrum and have no facilities of their own, and meet their educational requirements merely by riding “over the top” of the commercial network. These actions speak loudly and clearly – educators have moved from the facilities based video distribution of the 1960s to broadband-based over-the-top distribution of educational content and, as such, they do not require a spectrum set-aside. With the widespread availability of broadband (to be augmented by the steps the Commission is taking in other proceedings to promote rural deployments and expand access in schools and libraries), educators no longer have a compelling need for reserved access to the 2.5 GHz band. Yet, every day, commercial operators face unnecessary operational and financial burdens because critical 2.5 GHz spectrum is only available to them by leasing from a middleman (the educator who was fortunate enough to secure spectrum decades ago to serve a need that no longer exists). Eliminating the Commission-mandated middleman with respect to both currently licensed EBS spectrum and the EBS white space will relieve commercial networks of those burdens, and promote the widest deployment of 2.5 GHz broadband at the lowest possible cost to consumers. All the while, educators and students will have access to broadband networks educators need to distribute over those broadband networks as much educational content as they desire.

***Second, the focus of this proceeding should be on providing licensees and commercial lessors with additional flexibility.*** Already, some EBS interests have opposed the Commission's proposal to eliminate EBS eligibility restrictions and educational use requirements and cite to offerings that they want to continue providing. The Commission should take no action that would preclude EBS licensees from retaining their licenses or from continuing to provide existing levels of educational service, if they so choose. But that does not mean that all EBS licensees are of the same view. Others (likely a silent majority) will prefer to have flexibility in the rules that permits them to assign their spectrum to a commercial operator in exchange for funds that they believe can better be used to meet local educational needs. Such educators could then rely instead on commercial broadband networks or other spectrum options (such as unlicensed Wi-Fi or the upcoming 3.5 GHz Citizens Broadband Radio Service) to meet distribution needs.

***Third, commercial broadband system operators who have invested in good faith to lease EBS spectrum, deploy facilities, and bring service to the public should not be penalized because the Commission now has determined that the EBS regulatory model is obsolete.*** WCA's members have done the best possible job under a regulatory regime that has outlived its useful life, taking the capacity they lease and productively using it where it is available to provide highly valuable broadband services to the public. There is nothing in the record to suggest that the contractual rights obtained by those commercial operators should be prejudiced for doing exactly what the Commission encouraged them to do under the EBS leasing model. As

a practical matter, this means that the Commission should take no action that interferes with existing leases or modifies spectrum allocations to reduce the bandwidth or geographic service area assigned to any 2.5 GHz band lessor or lessee.

Based on these three principles, WCA specifically urges the Commission to:

- Rationalize the existing Geographic Service Areas (“GSAs”) of incumbent EBS licensees by expanding each GSA to the county boundary of any county the existing GSA overlaps;
- Eliminate the provisions of Section 27.1201 of the Rules that restricts eligibility to hold an EBS license to educational entities;
- Eliminate the provisions of Section 27.1214 of the Rules that require EBS leases to meet certain requirements not imposed on leases in other services;
- Auction the remaining vacant EBS spectrum by county after the rationalization of the incumbent GSAs to the county boundary is complete;
- Apply to the newly-issued EBS licenses the construction buildout requirement based on the current BRS requirement in §27.14(o) for stations licensed after November 6, 2009 – a showing of substantial service within 4 years of the date of issuance of the new license;
- Apply the existing Wireless Radio Service renewal and discontinuance rules to any new licenses on the EBS band; and
- Make clear that its actions in this proceeding are not intended to effect the provisions of existing leases of EBS spectrum and should not be deemed to pre-empt those leases in any manner.

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The Wireless Communications Association International (“WCA”), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, submits these comments in response to the *Notice of Proposed Rulemaking* in this proceeding (“*Notice*”).<sup>1</sup>

As early filings in this docket establish, improving broadband availability in unserved and underserved areas of America is critical to meeting educational needs.<sup>2</sup> Indeed, improved broadband availability in those areas is essential to meeting not only educational interests, but also meeting the wide range of economic and social needs broadband serves. As WCA has previously demonstrated on several occasions, there is a substantial overlap between those areas of the country where Educational Broadband Service (“EBS”) spectrum has yet to be licensed and areas where residents and businesses are unserved or underserved by broadband.<sup>3</sup> With the

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<sup>1</sup> *Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, FCC 18-59 (rel. May 10, 2018) (“*Notice*”).

<sup>2</sup> See, e.g., Joint Motion of the Schools, Health & Libraries Broadband (SHLB) Coalition et al. for Extension of Time of Comment Cycle, WT Docket No. 18-120 (June 18, 2018); Comment of Joe Dusenbery, WT Docket No. 18-120 (June 27, 2018); Samantha Schartman-Cyck and Katherine Messier, *Bridging the Gap: What Affordable, Uncapped Internet Means for Digital Inclusion*, submitted by Voqal and North American Catholic Educational Programming Foundation, Inc. (NACEPF), WT Docket 18-120 (May 3, 2018) (“Voqal May 3 Ex Parte”).

<sup>3</sup> See, e.g., Letter from Mary N. O’Connor, Counsel to the WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (Feb. 15, 2017); Letter from Mary N.

*Notice*, the Commission correctly recognizes the fundamental changes that have taken place since the Commission first established an educational reserve at 2.5 GHz and wisely questions whether restricting licensing of the EBS white space to educators, rather than making it available to commercial broadband service providers, is the most effective and efficient vehicle for closing the digital divide.<sup>4</sup> WCA applauds the Commission for its willingness to take a fresh approach to the EBS spectrum in light of these changes and below recommends specific steps the Commission can take to best assure that the 2.5 GHz band is effectively deployed for broadband services.

## **I. INTRODUCTION.**

Since its founding in the mid-1980's, WCA has represented commercial interests that operate communications services utilizing the 2.5 GHz band, as well as licensees and lessees of that spectrum. While initially WCA was founded to promote the then-emerging use of the 2.5 GHz band for the provision of "wireless cable" services in competition with the cable industry's multichannel video programming distribution ("MVPD") offerings, by the mid-1990s it had become clear that the highest and best use of the band would be for the provision of broadband services. WCA spearheaded efforts to revise the Commission's regulatory regime to promote broadband use of the band, and today, WCA's commercial operators utilize leased EBS spectrum, as well as owned and leased Broadband Radio Service ("BRS") spectrum, to provide a

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O'Connor, Counsel to the WCA, to Ajit Pai, Chairman, Federal Communications Commission, WT Docket No. 03-66 (Jan. 24, 2017).

<sup>4</sup> In Ajit Pai's initial remarks upon assuming the Chairmanship of the Commission, he made clear that "one of our core priorities going forward should be to close [the digital] divide – to do what's necessary to help *the private sector* build networks, send signals, and distribute information to American consumers, regardless of race, gender, religion, sexual orientation, or anything else." See Ajit Pai, Chairman, Federal Communications Commission, Remarks Washington DC, at 2 (Jan. 24, 2017) <https://docs.fcc.gov/public/attachments/DOC-343184A1.pdf> (emphasis added).

wide range of fixed and mobile broadband services in markets large and small across the country. WCA's membership includes Sprint, who, as the Commission is well aware is making significant use of the 2.5 GHz band for its offering of 4G services and has announced that the band will be a critical component of its 5G offerings.<sup>5</sup> But, perhaps more importantly for purposes of these comments, WCA also represents a wide range of smaller operators that have successfully deployed broadband services throughout the country.<sup>6</sup> With these comments, WCA will address the issues raised in the *Notice* with a particular focus on the perspective of the smaller broadband service providers.

Notwithstanding the outdated "command and control" EBS regulatory regime that imposes unnecessary financial and operational costs on broadband operators utilizing leased EBS spectrum, today over 60 of these smaller operators are providing service to communities through EBS spectrum leases. To cite but a few examples:

- Evertex offers internet service in three states in the mid-west, and the fixed wireless service is available to an estimated 187,000 people. Evertex uses spectrum it leases from EBS licensees in Northwest Iowa to offer LTE-type services to rural areas that are underserved. Evertex's LTE service is very popular with farmers for grain bin monitoring, field irrigation systems, and security and monitoring for hog and cattle sheds.
- Rise Broadband is the largest independent wireless internet service provider ("WISP") in the country and it utilizes EBS spectrum to provide LTE-grade services to communities that typically lack a choice in broadband providers. Rise Broadband uses capacity from EBS leases that cover over 2,100,000 people in areas in Illinois, Nebraska, Missouri and Texas to provide fixed broadband services with speeds up to 50 Mbps with no data caps.

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<sup>5</sup> See, e.g., Martha DeGrasse, *Sprint's John Saw*, FIERCE WIRELESS (July 2, 2018), <https://www.fierce-wireless.com/special-report/sprint-s-john-saw> (explaining Sprint's plans to utilize its 2.5 GHz band spectrum to build out Massive MIMO).

<sup>6</sup> Sprint will be filing its own comments in response to the *Notice* – comments that WCA anticipates will be consistent in all major respects with these comments, but which may differ in some particulars.

- Beamspeed is a full service provider of reliable and efficient data communication solutions including high-speed internet access for residential and business customers in Yuma and Imperial counties in Arizona. In 1998, Beamspeed began utilizing 2.5 GHz spectrum including leased EBS spectrum to provide local internet service. As technology has evolved, Beamspeed has adjusted and upgraded to currently providing LTE service. Beamspeed covers approximately 300,000 customers in rural areas where little else is available for high-speed internet service.
- Redzone Wireless, LLC (“Redzone”) located in Rockland, Maine was established to build a next generation fixed wireless broadband network within the state of Maine. In 2015 Redzone launched a statewide 4G LTE service utilizing leased EBS spectrum that covers 225,000 Maine households and more than 40,000 businesses across the state. Each new site Redzone builds incorporates both 4G LTE service and 5G technology. Redzone is the only fixed wireless internet provider to use 4G LTE Advanced in the state of Maine.
- SpeedConnect’s service covers over 5,000,000 people in 10 Midwestern states, and has focused not only on bringing internet connectivity to rural and underserved communities and customers, but to also offer the latest and fastest technology to these rural areas – high-speed, high-capacity wireless internet. SpeedConnect uses 2.5GHz EBS spectrum to provide LTEXtreme internet service, with 5, 15, 25 and 50 Mbps speeds to meet subscriber needs for streaming video services.

Given this record, WCA takes issue with the *Notice*’s assertion that the 2.5 GHz spectrum is underutilized.<sup>7</sup> The limited *educational* use of the spectrum should not be confused with the extensive use by *commercial* wireless operators. Certainly, it is true that as a direct result of the Commission’s failure for more than 20 years to resolve Instructional Television Fixed Service (“ITFS”)/EBS licensing issues, approximately one half of the geographic area of the United States has EBS spectrum available. But in those areas of the country where EBS spectrum has been made available (which encompass far in excess of 50 percent of the US population), commercial lessees in the 2.5 GHz band have provided a full range of wireless services, constantly adjusting their offerings to reflect the highest and best use of the band. And, because critical 2.5 GHz spectrum is only available to those commercial broadband operators by leasing

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<sup>7</sup> See, e.g., *Notice* ¶ 61, Statement of Commissioner Brendan Carr.



from a middleman (the educator who was fortunate enough to secure spectrum decades ago to serve a need that no longer exists), they have had to overcome unnecessary operational and financial regulatory burdens imposed by the Commission's outdated command and control regulatory scheme for EBS.<sup>8</sup>

The Commission's approach to the issues presented by the *Notice* should be guided by three overarching principles: 1) the highest and best use of the 2.5 GHz band today is for the provision of commercial broadband services, 2) the focus of the proceeding should be on providing licensees and commercial lessors with additional flexibility in place of outdated and counterproductive command and control restrictions, and 3) commercial broadband operators reliant on leased EBS spectrum should not be penalized because the Commission has now determined that the EBS model is obsolete. Based on these principles, the Commission should adopt the following approaches to closing the digital divide:

1. To provide commercial broadband providers with service areas that are sufficiently large to permit service and that reflect marketing realities, the Commission should rationalize the existing Geographic Service Areas ("GSAs") of incumbent EBS licensees by expanding each GSA to the county boundary of any county the existing GSA overlaps.
2. To assure that the EBS spectrum is put to its highest and best use (*i.e.* commercial broadband), the Commission should auction the remaining vacant EBS spectrum by county after the rationalization of the existing GSAs to the county boundary is complete.
3. To promote the most effective and efficient deployment of broadband without saddling commercial operators with the burdens associated with EBS leasing, the Commission should open the eligibility for new EBS licenses to any entity eligible to hold an Commission license and should provide new and existing EBS licensees with the flexibility, should they so choose, to assign their licenses to any entity eligible to hold an Commission license.

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<sup>8</sup> As discussed in more detail below, eliminating the Commission-mandated middleman with respect to the EBS white space, and potentially with respect to existing licensees, will relieve commercial networks of those burdens, and promote the widest deployment of 2.5 GHz broadband at the lowest possible cost to consumers. All the while, educators and students will continue to have access to broadband networks educators need to distribute as much "over the top" educational content as they desire.

4. To reflect the changed nature of EBS, the Commission should eliminate the mandatory minimum educational use rules and all EBS specific leasing rules that impose significant economic and operational costs on commercial service providers, while allowing those EBS licensees that so choose to voluntarily continue whatever educational use of EBS they desire.
5. Reflecting the overwhelming commercial use of the EBS spectrum, the Commission should apply the existing Wireless Radio Service (“WRS”) renewal and discontinuance rules to all current and new licenses in the EBS band.
6. New EBS licenses should be subject to a construction buildout requirement based on the current BRS requirement in §27.14(o) for stations licensed after November 6, 2009 – a showing of substantial service within 4 years of the date of issuance of the new license.
7. To avoid unintended harm to the commercial broadband service providers that today rely on leased EBS spectrum, the Commission should make clear that, notwithstanding these changes, it contemplates that existing leases of EBS spectrum will remain in effect according to their terms.

## **II. THE COMMISSION SHOULD ADOPT A REGULATORY REGIME THAT PROMOTES TODAY’S HIGHEST AND BEST USE OF THE 2.5 GHz BAND – THE PROVISION OF COMMERCIAL BROADBAND SERVICES.**

The importance of assuring that the 2.5 GHz band is used efficiently and effectively cannot be understated. Just last month, the Commission acknowledged that:

America’s appetite for wireless broadband service is surging. According to Cisco, North American mobile traffic grew 44 percent in 2016 and will continue to grow at a near 35 percent compound annual growth rate through 2021. Ericsson predicts that between 2016 and 2022 the data traffic generated by smartphones in North America will increase by a factor of six. And while mobile traffic is surging in sections of the United States, many communities still lack access to meaningful broadband connectivity. More intensive use of spectrum can allow wireless operators to fill in gaps in the current broadband landscape. For example, fixed wireless services provide an additional opportunity to connect rural communities and to offer competitive wireless alternatives in urban areas. Additional spectrum must be identified, however, if we are to seize the 5G future and meet the connectivity needs of all Americans.<sup>9</sup>

This proceeding provides the Commission with an opportunity to advance those goals by eliminating antiquated command and control restrictions from the 2.5 GHz band to promote the

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<sup>9</sup> *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order and Notice of Proposed Rulemaking, FCC 18-91, ¶ 3 (rel. July 13, 2018) (“3.7 Order”) (citations omitted).

deployment of commercial broadband networks in the rural areas where there is EBS white space.

While the Commission's 1963 decision to set aside spectrum for ITFS, the predecessor of EBS, made sense at the time, fifty-five years later there is no longer any compelling case for the reservation of any portion of the band for licensing exclusively to educational institutions.<sup>10</sup> In the early years of television, non-educational television had been the vehicle of choice for educators seeking to get their content into schools. But, by the early 1960s the nature of non-educational television was changing from classroom-oriented programming to programming with more of a mass-market focus, and traditional educators were being squeezed out. Educators needed to find a new vehicle for distributing their content – broadband and the resulting over-the-top opportunity that is today successfully employed by companies such as Netflix, Amazon, YouTube, HBO, Showtime, DISH, AT&T, etc. was decades away. Reserving the 2.5 GHz spectrum – spectrum considered at the time unusable for most other purposes – for educators to construct their own transmission facilities to distribute their own content looked to be a painless answer to the dilemma faced by educators.

However, as the Commission recognized in its 1983 decision restructuring the 2.5 GHz band, ITFS failed to gain a significant foothold during its first two decades, largely because educators are ill-equipped to bear the costs and face the operational complexities associated with

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<sup>10</sup> See *Amendment of Parts 2 and 74 of the Commission's Rules and Regulations to Establish a New Class of Educational Television Station of the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 1990-2110 Mc/S or 2500-2690 Mc/S Frequency Band*, Report and Order, 39 F.C.C. 846 (1963), on recon. 39 F.C.C. 873 (1964); *Amendment of Sec. 74.902 of the Rules Governing Instructional Television Fixed Stations to Assign Alternate Channels to Stations Operating in the Same Area Instead of Every Sixth Channel*, 2 Rad. Reg. 2d 1615 (P&F 1964).

constructing and operating their own transmission facilities.<sup>11</sup> Indeed, in addressing the extent to which commercial lessees could assume control over the design, construction and operation of ITFS transmission facilities, the Commission recognized that commercial entities are better equipped than educators to accomplish these tasks and therefore focused on the ability of the ITFS licensee to control and promote its educational programming when evaluating questions of licensee control.<sup>12</sup> While at that time a reservation of educational spectrum was necessary to assure the distribution of educational programming (there being no “over the top” vehicle), today broadband gives all educators – not just those lucky enough to be EBS licensees – the ability to provide access to educational materials to whomever they choose. The reservation of spectrum for educators is no longer necessary, and in fact, is deterring the best use of 2.5 GHz spectrum.

One need only look at existing leases between educators and commercial lessees (almost all of which were entered into after the predominant use of the 2.5 GHz band shifted from wireless cable to broadband) to see how little the educational community actually values the ability to construct and operate its own facilities. While there are no doubt a handful of exceptions, the vast majority of EBS licensees allow commercial operators to utilize all of their EBS spectrum in constructing broadband networks and have no facilities of their own, meet their educational requirements by riding over-the-top of the commercial network, and provide the maximum permissible amount (95 percent) of capacity for non-educational use. Indeed, in many cases the EBS licensee also has contractually committed to assign its license to its commercial

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<sup>11</sup> *Amendment of Parts 2, 21, 74 and 94 of the Commission’s Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operation Fixed Microwave Service*, Report and Order, 94 F.C.C.2d 1203, 1250-51 ¶¶118 (1983) (“*ITFS R&O*”).

<sup>12</sup> *Amendment of Part 74 of the Commission’s Rules and Regulations In Regard to the Instructional Television Fixed Service*, Second Report and Order, 101 F.C.C.2d 49, 96-100 ¶¶101-106 (1985).

operator lessee in the event the Commission eliminates the current rules that preclude such an assignment. This is hardly a sign that educators need access to EBS to distribute educational content.

While those seeking to preserve the *status quo* will no doubt point to the efforts of Northern Michigan University (“NMU”) to establish a broadband network across the Upper Peninsula of Michigan, two points are worth noting.<sup>13</sup> First, NMU is a “one off” – as noted above, the vast majority of EBS licensees have evidenced no interest in building and operating their own facilities.<sup>14</sup> Second, what NMU is offering is, for all intents and purposes, a commercial broadband service that is virtually indistinguishable from what WCA’s commercial broadband service providers offer (but were precluded from offering in NMU’s area because the EBS spectrum had not been licensed). The question the Commission must ask is whether educators are so uniquely suited to the provision of commercial broadband service that they, and they alone, should be eligible for EBS licenses. The record suggests that while NMU and perhaps a handful of other EBS eligible entities may be ready, willing and able to construct and operate commercial broadband networks, by and large educators possess neither unique capabilities that justify limiting eligibility nor the resources necessary to do so. As Commissioner Brendan Carr observed, “the tortured history of the 2.5 GHz band shows, command and control set-asides and restrictions on spectrum use are not the most effective way

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<sup>13</sup> See, e.g., Jodi Nass, *Building a Network on Michigan’s Upper Peninsula: See how EBS Licensees are impacting education!*, National EBS Association, <https://nebsa.org/index.cfm/ebs-in-action/northern-michigan-university/> (last visited Aug. 7, 2018); *Applications of The Board Of Trustees Of Northern Michigan University, For New Educational Broadband Service Stations*, Memorandum Opinion and Order, 31 FCC Rcd 3371 (WTB 2016) (granting waiver of filing freeze on new EBS applications).

<sup>14</sup> Underscoring the changed technological circumstances, and the reduced need for EBS-specific spectrum, is the fact that, as Commissioner O’Rielly observed, “of the approximate 2,190 active EBS licenses today, it is estimated that 2,000 of those licenses are leased in most part to commercial providers.” *Notice* Statement of Commissioner Michael O’Rielly.

to serve students.”<sup>15</sup> The better approach is to allow an unfettered marketplace to bridge the digital divide by eliminating rules that have proven to frustrate broadband deployment. Only then can the United States “seize the 5G future and meet the connectivity needs of all Americans.”<sup>16</sup>

**III. TO PUT THE BAND TO ITS HIGHEST AND BEST USE, THE COMMISSION SHOULD RATIONALIZE EXISTING GEOGRAPHIC SERVICE AREAS TO THE COUNTY BOUNDARY, ELIMINATE RULES RESTRICTING EBS ELIGIBILITY TO EDUCATORS AND THEN AUCTION THE REMAINING WHITE SPACE.**

**A. Rationalizing Existing EBS Spectrum to the County Border Will Best Support Network Deployment in the 2.5 GHz Band.**

To promote broadband deployment and efficient spectrum use, the Commission must rationalize existing 2.5 GHz service areas.<sup>17</sup> The current 35-mile radius circular GSAs do not match fixed or mobile broadband licensing in other bands, and cause unnecessary confusion in the marketplace regarding the availability of service. Rationalizing these areas to make them consistent with established geographic boundaries used in other services and to provide greater consumer clarity regarding service availability will promote deployment and elimination of the digital divide in rural areas.

The proposal negotiated and submitted to the Commission in 2014 by WCA, the Catholic Television Network, the National Educational Broadband Service Association and the Hispanic Information and Telecommunications Network, Inc. (the “Consensus Proposal”)<sup>18</sup> recommends

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<sup>15</sup> *Id.* Statement of Commissioner Brendan Carr.

<sup>16</sup> 3.7 Order ¶ 3 (citations omitted).

<sup>17</sup> Notice ¶ 11.

<sup>18</sup> Letter from Edwin N. Lavergne, Counsel for Catholic Technology Network et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 03-66 (June 6, 2014) (submitted by National EBS Association et al.).

expansion to the county boundaries that occur automatically by action of the Commission upon the effective date of the new rules, without requiring applications or notices of participation.<sup>19</sup>

Under the Consensus Proposal, existing GSAs that cover any portion of a county and are immediately adjacent to unlicensed areas in the county would expand to fill such adjacent unlicensed area up to the county boundary lines.<sup>20</sup> If two or more co-channel GSAs cover any portion of the same county and are adjacent to the same unlicensed area in the county, the area of expansion within such unlicensed area would be split among the incumbent GSAs.<sup>21</sup>

WCA continues to believe this element of the Coalition Proposal is sound and it supports the Commission's rationalization proposal to allow expansion of existing GSAs to the nearest

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<sup>19</sup> The Commission asks about rationalization of grandfathered E and F EBS stations. *Notice* ¶ 11, n.27. WCA notes that there is no white space on the E and F frequencies because subject to § 27.1206 Basic Trading Area ("BTA") authorization service areas include the entire service area of all BRS frequencies in the BTA minus overlapping co-channel GSAs of incumbent BRS licenses and grandfathered E or F Group licenses. Grandfathered E and F group licenses are licensed to BRS frequencies thus, the BTA authorization holder is licensed to all of the spectrum up to the border of the grandfathered E and F group GSAs. As a result, there is no vacant spectrum surrounding the grandfathered E and F group licensees.

<sup>20</sup> A "county" means a county-equivalent entity as defined in Federal Information Processing Standards Publication 6-4 (Aug. 31, 1990), which is currently used by the FCC for spectrum licensing purposes.

<sup>21</sup> *See Notice* ¶ 14 (seeking comment on how to resolve situations where two or more co-channel GSAs overlap). Where a county is overlapped in whole or in part by two or more EBS GSAs, the existing GSAs should be expanded to the county boundary using the well-established "splitting the football" approach if the two or more EBS GSAs collectively overlap the geographic area of the county. Splits will occur by drawing straight lines between the reference points of participating incumbent GSAs (without crossing any other incumbent GSAs) and then drawing perpendicular lines to those lines located half way between the reference points which run to county boundaries or to the intersection with other such perpendicular lines, whichever occurs first. *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14192-94 ¶¶ 60-65 (2004); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5612 n.7 (2006).

county boundary.<sup>22</sup> However, WCA has serious concerns regarding the Commission’s proposal to deny such expansion where the GSA covers less than 25 percent of the census tracts in the county.<sup>23</sup> WCA appreciates the implicit concern that allowing expansion without some limit could result in a “windfall” where an existing licensee has extremely limited coverage of a given county. However, the Commission must take care not to limit GSA expansion in a way that remaining slices of the EBS white space become non-viable for commercial broadband. The Commission’s proposal could limit the utility of remaining EBS white space in those situations where, because of the application of this *de minimis* exception to rationalization, there is not enough spectrum available in a certain area, or the geographic area is too small to sustain a viable business. Ensuring the white spaces remain desirable without making the expansion process so complex that it actually delays broadband deployment, is a challenge. WCA looks forward to seeing how others propose to assure that expansion is done in a way that maintains the viability of the remaining EBS white space to be auctioned and to working with the Commission as to address this complex issue.

As the Commission has previously made clear, county boundaries are particularly beneficial in rural areas because they are “easy to administer and understand, population data based on county boundaries are widely available to the public, and county boundaries rarely

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<sup>22</sup> This proposal excludes and grandfathered E and F Channels as there is no white space available surrounding the GSAs of those licensees. As the Commission made clear prior to the auction of BTA licenses in 1995, “[t]he holders of BTA authorizations obtain contingent rights to this spectrum when they receive their authorizations, so that the forfeited channels will revert and become part of the BTA authorization up to the boundary of the BTA.” *Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Service*, Report & Order, 10 FCC Rcd 9589, 9612 ¶ 42 (1995) (“1995 R&O”).

<sup>23</sup> Notice ¶ 33.



change.”<sup>24</sup> The public interest would be served by expanding current EBS licensees to the county boundary because it would “allow for greater utilization of the unlicensed ‘white space’ spectrum by both EBS licensees and commercial providers with whom they partner.”<sup>25</sup> The *Notice* correctly observes, “a number of school districts are based on county boundaries, [therefore,] allowing county expansion could allow county-based school districts to better provide services to the students within their districts.”<sup>26</sup> And importantly for small commercial broadband network operators, county boundaries will alleviate consumer confusion regarding the availability of service. Today, it is challenging for operators to make clear to the public the contours of the area they serve because GSAs are not based on well-known geographic areas. Moving to census tracts, as the *Notice* proposes, does nothing to help the matter as consumers do not often know census tract boundaries. However, consumers are familiar with county boundaries and both consumers and smaller operators will benefit if service availability moves towards counties.<sup>27</sup>

Expanding to county boundaries will result in more efficient use of 2.5 GHz spectrum than the Commission’s proposal of expanding to the census tract boundary.<sup>28</sup> Census tracts are

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<sup>24</sup> See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 19078, 19087 ¶ 11 (2004) (citations omitted).

<sup>25</sup> Letter from Gardner H. Foster, Sprint Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, at 2 (Nov. 22, 2017). A group of rural carriers recently filed in support of counties over census tracts in the Commission’s CBRIS proceeding, noting that counties best support rural deployment. See Letter from Kirby J. Underberg, General Manager, Missouri RSA No. 5 Partnership d/b/a/ Chariton Valley et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 17-258 (May 29, 2018).

<sup>26</sup> *Notice* ¶ 32.

<sup>27</sup> For a carrier with a nationwide footprint, this issue is not present. For those relying exclusively on EBS spectrum GSA boundaries can largely define the area where service is available.

<sup>28</sup> *Notice* ¶ 11.

extremely small for the provision of a ubiquitous wireless service; the average size is from 0.6 - 0.8 square miles in total.<sup>29</sup> Given the size and the irregular shape of the census tracts and the favorable propagation characteristics at 2.5 GHz, it will be extremely difficult for operators to provide service to the edges of the census tracts and still protect adjacent licenses pursuant to the Commission's rules.<sup>30</sup> If an operator wants to cover an entire census tract to the edge it will likely have to reduce power significantly, reduce antenna heights and construct more sites. In addition, census tract boundaries change from time to time, which would result in additional confusion and costs to adjust to any changes for the operators and their subscribers as well as for the Commission. These operational challenges are real and are a significant deterrent particularly for smaller rural operators with limited budgets.

Even though the obsolete command and control EBS regulatory regime has presented difficulties for commercial operators, many small commercial operators operate successful and essential networks on their leased EBS spectrum. These operators are best positioned to quickly deploy networks in neighboring white spaces building on their existing networks, and many leases already provide for the commercial operator to access the spectrum should the Commission expand GSAs.<sup>31</sup> If the Commission is serious about closing the digital divide quickly, it should provide these proven operators the spectrum access they need to fully utilize

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<sup>29</sup> See Letter from Stacey Black, Assistant Vice President, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 17-258 (Apr. 5, 2018).

<sup>30</sup> As an example, see census tract 7046 in Montgomery County, Maryland where the census tract is only 1 city block wide in several locations. U.S. Census Bureau, 2010 Census – Census Tract Reference Map: Montgomery County, MD, [https://www2.census.gov/geo/maps/dc10map/tract/st24\\_md/c24031\\_montgomery/DC10CT\\_C24031\\_004.pdf](https://www2.census.gov/geo/maps/dc10map/tract/st24_md/c24031_montgomery/DC10CT_C24031_004.pdf) (last visited Aug. 6, 2018).

<sup>31</sup> Rationalizing to county boundaries would negate the need for a priority window for existing licensees. See Notice ¶ 32 (seeking comment holding a filing window for existing licensees to expand their service to the county border).

the 2.5 GHz band – an opportunity they have not had under the existing rules. Expanding the existing incumbent GSAs to the county boundary is a necessary and important first step in that process.<sup>32</sup>

**B. Providing Flexibility Through Open Eligibility Will Promote Intensive and Efficient Spectrum Use.**

WCA supports the Commission’s proposals both to provide EBS licensees with the flexibility to assign or transfer control of their licenses to entities that are not EBS-eligible and to open eligibility for new licenses to any entity that is qualified to be a Commission licensee.<sup>33</sup> As discussed above, while 50 years ago it was essential for educators to have their own spectrum for the broadcasting of video programming, the nature of educational use has fundamentally changed. With the widespread availability of high-speed broadband, there is no longer a compelling need for setting aside the majority of the highly-valuable 2.5 GHz band to be licensed primarily only to educators while the commercial operators who have been primarily responsible for deploying broadband networks in the 2.5 GHz band lease spectrum through an educator middleman. Indeed, the regulatory burdens associated with the leasing of EBS spectrum are counterproductive to the deployment of commercial broadband networks – as one early commenter points out “[s]pectrum capacity would not have been wasted to the same extent if licensees were able to repurpose or lease their spectrum for more productive uses.”<sup>34</sup> The *Notice* correctly recognizes that with changes in technology, the restrictions imposed on EBS

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<sup>32</sup> WCA proposes that immediately following the effective date of the new rules, the Commission should open a 60 day window for incumbent EBS licensees to apply to expand their GSA to the boundary of any county that the current GSA overlaps.

<sup>33</sup> *Id.* ¶ 20 (proposing to eliminate Rule 27.1201).

<sup>34</sup> Comments of R Street Institute, WT Docket No. 18-120, at 5 (July 30, 2018) (“R Street Institute Comments”).

license use and ownership are no longer necessary or appropriate.<sup>35</sup> Eliminating the eligibility requirements in Section 27.1201 of the Rules and permitting commercial entities to directly hold EBS licenses without the costs associated with leasing will promote intensive and efficient spectrum use by providing EBS licensees to those who ultimately place the greatest value on the spectrum. As Chairman Pai recently noted, “[r]egulatory humility also means that government shouldn’t pick winners and losers in the marketplace. The best way to maximize the benefits of new technologies is to promote a competitive marketplace and let market forces work.”<sup>36</sup>

Continuing to keep a thumb on the scale in favor of educational institutions that are not fully utilizing their scarce spectrum resource and maintaining a Commission-mandated, economically-inefficient middleman with respect to both currently licensed EBS spectrum and the EBS white space would be the opposite of permitting market forces to function as intended.<sup>37</sup> The

Commission should relieve commercial networks of the burden created by the current regulatory

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<sup>35</sup> Notice ¶ 19.

<sup>36</sup> Ajit Pai, Chairman, Federal Communications Commission, Remarks At The 18th Global Symposium For Regulators, Geneva, Switzerland, at 2 (July 10, 2018) <https://docs.fcc.gov/public/attachments/DOC-352412A1.pdf>.

<sup>37</sup> While there are few exceptions, for the most part this band has not primarily been used for the distribution of educational content, but rather for the provision of commercial services. For example, while Voqal has filed in the docket espousing its educational use of its EBS spectrum one must keep in mind that these services are provided over a commercial network buildout by its commercial partner Sprint. See Voqal May 3 Ex Parte. Sprint is providing the same if not better opportunities through its 1 Million Project, which offers free high-speed wireless connectivity to 1,000,000 low-income students lacking a reliable source of internet access at home. Brenda Stolyar, *Sprint’s 1Million Project connects 180,000 students to a free device and service*, Digital Trends (Aug. 14, 2017), [www.digitaltrends.com/mobile/sprints-1million-project/](http://www.digitaltrends.com/mobile/sprints-1million-project/). See also The 1million Project Foundation, [www.1millionproject.org](http://www.1millionproject.org) (last visited Aug. 6, 2018).

regime and provide operators with flexibility and open eligibility to promote the widest deployment of 2.5 GHz broadband at the lowest possible cost to consumers.<sup>38</sup>

The Commission is also correct that EBS licensees are in the best position to determine how to maximize the value of their spectrum.<sup>39</sup> By allowing flexibility, the Commission will put the decision-making in the hands of the EBS licensee. Some licensees will choose to assign their EBS spectrum and utilize the proceeds for the advancement of their educational purposes (including, perhaps investing in unlicensed or “licensed light” spectrum options, such as Wi-Fi or the General Authorized Access portion of the 3.5 GHz Citizens Broadband Radio Service). Others will see greater value in retaining the EBS license and either leasing the spectrum to a commercial operator or self-deploying. Most importantly, the decision should remain in the hands of the educator. If, as WCA suggests, the Commission eliminates EBS eligibility requirements, the Commission should take no action that would preclude EBS licensees from retaining their existing licenses and leasing their spectrum under the general secondary market rules, if that is their choice.<sup>40</sup>

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<sup>38</sup> As the R Street Institute observes, “[w]hile educational uses of spectrum may be worthy goals of social policy, they must be compared with alternatives that may yield even greater benefits to consumers.” R Street Institute Comments at 6.

<sup>39</sup> *Notice* ¶ 20.

<sup>40</sup> Since the *Notice* was adopted, some educational entities have filed letters asking that the Commission not take away the EBS spectrum from the current EBS licensees – citing their reliance on the free Internet being provided to the schools and attempting to incite fear that the Commission’s proposal would take EBS spectrum away from existing licensees. *See, e.g.*, Comments of Ivar Nelson, WT Docket No. 18-120 (June 22, 2018); Comments of David Wu, WT Docket No. 18-120 (June 21, 2018); Comments of Giuseppina Azzolini, WT Docket No. 18-120 (June 21, 2018). It is critical to note that WCA is not proposing that spectrum be taken away from any EBS licensee, but rather that the Commission provide existing and future licensees with the freedom to determine how to best to use their spectrum. In addition, it should be noted that many of those entities appear to be receiving their internet access via a broadband platform provided by a commercial operator that leases EBS spectrum, not from a network constructed by an educator.

**C. Auctioning Remaining EBS White Space after Rationalizing to County Borders Is the Quickest Way to Help Address the Digital Divide.**

The vacant EBS white space consists largely of spectrum in rural areas, in particular areas west of the Mississippi River. The record developed in WT Docket No. 03-66, the predecessor to this proceeding, established that there are swaths of the country (often quite rural) that are both unlicensed in the 2.5 GHz band and underserved for broadband services.<sup>41</sup> The quickest and most efficient route to bolstering broadband service in those areas is to license the 2.5 GHz white space to commercial operators via auction after the rationalization of GSAs to county boundaries described above occurs. Simply put, as discussed above, commercial operators are better equipped than the overwhelming majority of educational entities to immediately deploy broadband networks in rural areas, and once new commercial operators build out their systems, local educational entities will be able to enjoy the benefits of their services – much as they do today upon leasing their spectrum to commercial entities.<sup>42</sup>

WCA agrees with the *Notice*'s proposal to use the existing competitive bidding rules set forth in Part 1, Subpart Q.<sup>43</sup> The auction should be conducted as a county-by-county overlay, with any previously licensed GSAs on a given channel grandfathered (similar to how BRS was auctioned based on BTAs, with any previously licensed service areas exempted).<sup>44</sup> As the Commission did when it auctioned MDS white space using geographic licenses, incumbent GSAs should be grandfathered and the winner of the county for those specific frequencies should

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<sup>41</sup> See Letter from Paul J. Sinderbrand, Counsel to the WCA, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (Mar. 30, 2016).

<sup>42</sup> If the Commission adopts a Tribal Nation window, the Commission should move to auction after than window. *Notice* ¶¶ 35-39.

<sup>43</sup> *Id.* ¶ 49.

<sup>44</sup> 1995 *R&O*, 10 FCC Rcd at 9611 ¶ 39; *Auction Of Broadband Radio Service (BRS) Licenses Scheduled For October 27, 2009*, Public Notice, 24 FCC Rcd 8277, 8288 ¶ 33 (WTB 2009).

secure the space within the county that is not within an incumbent's GSA.<sup>45</sup> Using counties as the geographic area for new licenses will not only be consistent with expanded GSAs afforded existing licensees, but will also provide an appropriate balance between the desire of small operators to have the smallest viable auctioned service areas and the technical characteristics of the 2.5 GHz band that argue against even smaller service areas, such as census blocks.

The Commission should auction the white spaces in three blocks that conform to the existing Lower Band Segment, Middle Band Segment and Upper Band Segment of the BRS/EBS 2.5 GHz band plan. More specifically, the three licenses for each county should be as follows:

- Lower Band – existing channels A1-3, B1-3, C1-3, D1-3 and the J channels (2501-2572 MHz)
- Middle Band – existing channels A4, B4, C4, D4 and G4 (2572-2602 MHz)
- Upper Band – existing channels G1-3 (2673.5-2690 MHz), plus the associated K channels (2615-2616 MHz)

Auctioning the 2.5 GHz spectrum in the blocks set forth above will maximize the likelihood that the spectrum will be awarded to the bidders to whom they have the highest value. Because operators have focused on securing contiguous spectrum to achieve operational efficiencies, this approach will allow operators to fill in holes that may exist in their spectrum access, without requiring operators to acquire spectrum they likely do not require.<sup>46</sup> For example, today EBS licensees generally have a 16.5 MHz swath in the Upper or Lower Band, and a 6 MHz channels in the Middle Band that often goes underutilized.<sup>47</sup> Auctioning the

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<sup>45</sup> See 47 C.F.R. § 27.1206(a)(2).

<sup>46</sup> Should the Commission consider in-market limits, it should structure such limits in a way that small operators are able to deploy a viable competitive service.

<sup>47</sup> The current EBS bandplan for each of the EBS channel groups includes 3 channels in the Lower Band Segment or Upper Band Segment (in the case of the G Group) and a separate single 6 MHz channels in the Mid Band Segment and associated J or K channels. This bandplan is outdated and was established to

Middle Band EBS channels as one group of contiguous channels (A4, B4, C4, D4 and G4) rather than either as standalone individual channels or as an appendage to the Lower Band Segment or Upper Band Segment channels in the same group will provide a license with a significant amount of contiguous spectrum that operators can utilize for broadband service in rural areas. And, by making available the entire Lower Band Segment, comprising 70 MHz of contiguous EBS spectrum, the Commission will make it possible for an entity that has no spectrum in the market, to launch a viable modern broadband service (which requires a minimum of 40 MHz of contiguous spectrum).

Finally, any remaining BRS Basic Trading Area licenses that have been forfeited, cancelled or otherwise returned to the Commission should be auctioned at the same time as the EBS white space, thereby providing yet another opportunity for broadband providers to gain access to much needed spectrum.<sup>48</sup>

#### **IV. THE COMMISSION SHOULD TAKE STEPS TO PROVIDE ADDITIONAL FLEXIBILITY TO EBS LICENSEES AND PROTECT CURRENT LESSEES.**

As Commissioner Carr has made clear, “[c]utting regulatory red tape is key to bringing more broadband to more Americans.”<sup>49</sup> The outdated regulatory red tape (including the educational use requirements, licensee spectrum reservation requirements, programming requirements and restrictions on the duration and content of leases beyond those imposed on

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protect broadband operations from the high-powered video operations that some licensees maintained, but those protections are not necessary for the new licensees that for the most part will be providing a broadband service.

<sup>48</sup> Currently there are 17 vacant BRS BTAs. In 2009, the Commission held its most recent BRS auction (Auction 86) and 17 BTAs did not receive winning bids. *See Auction of Broadband Radio Service Licenses Closes: Winning Bidders Announced for Auction 86*, Public Notice, 24 FCC Rcd 13572 (2009). Not surprisingly, most of the vacant BTAs are in rural areas. There has been no opportunity for interested parties to bid on and become licensed to the BRS BTAs since 2009.

<sup>49</sup> *See, e.g.*, Brendan Carr (@BrendanCarrFCC), Twitter (Apr. 17, 2018, 12:22 PM), <https://twitter.com/-brendancarrfcc/status/986323947758280704>.



other secondary market leases)<sup>50</sup> currently attached to EBS licenses long ago stopped serving a relevant purpose. To the contrary, these rules impose significant economic and operational costs on commercial operators seeking to use the band to bring broadband to rural America. As previously set forth herein, the Commission should eliminate the eligibility requirements set forth in Section 27.1201 of the Commission's Rules. Providing EBS licensees and commercial lessees with the maximum permissible freedom to utilize the spectrum (subject to the limits imposed under the secondary market rules on other leasing arrangements) will ensure that EBS spectrum is utilized most efficiently with the market dictating the highest and best use for the spectrum. Licensees are in a far better position than the Commission to determine what that use is for their current 2.5 GHz spectrum.<sup>51</sup>

Unfortunately, while many small operators have managed to utilize leased EBS spectrum, the current command and control leasing restrictions are not only outdated, they actively work to obstruct spectrum deployment by commercial operators.<sup>52</sup> WCA fully supports the Commission's proposal to eliminate Section 27.1214(e), which restricts the maximum term for an EBS lease to 30 years and requires lessees after the first 15 years of a lease to accommodate the educational needs of the EBS licensees every five years (a vague requirement that imposes

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<sup>50</sup> See 47 C.F.R. § 27.1214(b)(1) (requiring the licensee to reserve a minimum of five percent of the capacity of its channels for educational uses); *id.* § 27.1214(a)(1) (requiring a licensee to provide at least 20 hours per week of EBS educational programming before entering a spectrum leasing arrangement); *id.* § 27.1203(b) and (c) (EBS Programming Requirements); all of § 27.1214 (EBS Spectrum Leasing Arrangements and Grandfathered leases).

<sup>51</sup> Notice ¶ 22.

<sup>52</sup> The amount of spectrum available for small operators is often limited due to budgetary and operational constraints. Pursuant to the current EBS licensing regime the operators are forced to pay rent to EBS licensees and on top of that not utilize five percent of the capacity on the spectrum they lease. Thus making deployment cost prohibitive in some instances. In addition, uncertainty regarding renewal of leases at the end of a term forces many operators to try to look elsewhere for spectrum.

significant risk on commercial operators).<sup>53</sup> The language of Section 27.1214(e) itself reflects that the educational “look-back” is in place “in furtherance of the educational purpose for which EBS spectrum is primarily allocated.” But in so doing, it leaves open the possibility that commercial operations that are in place will have to be constrained by the operator, downgrading (if not eliminating) service to consumer who rely on broadband for more than just access to an EBS licensee’s educational material. The Commission’s goal should be to provide commercial operators with regulatory certainty to spur investment in rural areas where earning a profit can be challenging – this requirement introduces an element of uncertainty that does nothing but deter investment.

Again, WCA’s position should be clear – those EBS licensees that wish to maintain their educational use should be permitted to do so, but for those who might decide to either transfer their licenses or lease without being burdened with the current command and control requirements. The educational use requirements of Section 27.1214 decrease the utility of the spectrum for any interested lessees or acquirers and deters investment in rural broadband. Thus, the Commission should eliminate the requirements set forth in Section 27.1214(a) of the Commission’s Rules regarding the educational use requirement for EBS licensees and Section 27.1214(b)(1) of the Commission’s Rules regarding the minimum amount of capacity an EBS licensee must reserve for its educational use if it leases its spectrum. As the Commission itself noted, with the onset of full flexibility, the need for educational use requirements have been nullified.<sup>54</sup> In fact, all educational specific rules should be eliminated, including eligibility,

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<sup>53</sup> *Id.* ¶ 23 (proposing to eliminate 47 C.F.R. § 27.1214(e)).

<sup>54</sup> *Id.*

reserve capacity, educational look-back, programming requirements and limits on lease terms.<sup>55</sup>

These rules are a relic of the regulatory regime that holds the EBS spectrum back from meeting its full potential. The past 30-years of EBS leasing have made it clear that “the existing educational use requirements are out of date and do not fit the actual use of the spectrum.”<sup>56</sup>

In addition, WCA supports the elimination of Sections 27.1203 (b) and (c). These rule parts set forth the educational programming requirements applicable under the current rules to provide EBS licensees examples of services that would be acceptable to the Commission for the licensees to meet their educational use requirement. With the potential onset of open eligibility and full flexibility for EBS licenses and the elimination of the educational use requirements these rules are moot.

WCA agrees that there should be no maximum lease term limits or other restrictions in leases designed to address educational usage, but the Commission must also make clear that its actions in this docket should not be read to preclude current leases from continuing to be enforced according to their terms in accordance with applicable state law. The only Commission leasing or use rules that should apply to 2.5 GHz spectrum going forward are the Commission’s general secondary market rules for leasing thus putting the 2.5 GHz spectrum on equal footing with other bands.<sup>57</sup>

Finally, if the Commission adopts its proposals to eliminate the restrictions on EBS eligibility, educational usage requirements, and certain spectrum leasing rules, the Commission

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<sup>55</sup> See 47 C.F.R. §§ 27.1201, 27.1203(b)-(c), 27.1214(a), (e).

<sup>56</sup> Notice ¶ 22.

<sup>57</sup> See generally 47 C.F.R. Part 1, Subpart X.

should modify the spectrum screen to include all of the EBS spectrum.<sup>58</sup> Today's marketplace realities have changed and including a discount based on outdated educational use requirements and eligibility would not reflect the new reality that all EBS spectrum can be used for commercial purposes.

**V. OPENING A PRIORITY FILING WINDOW FOR NEW EDUCATIONAL LICENSEES IS UNNECESSARY TO SUPPORT THE PROVISION OF EDUCATIONAL CONTENT AND SERVICES AND WILL IMPOSE UNNECESSARY COSTS ON COMMERCIAL BROADBAND DEPLOYMENT.**

As set forth above, the overwhelming majority of current EBS licensees lease 95 percent of their spectrum to commercial operators, have constructed no network facilities of their own and, in many cases, have already agreed to assign their EBS licenses to commercial operators. Why then, would the Commission give educational entities priority access to new licensees? To reap a windfall by entering into similar leases with commercial operators who will actually deploy the network and utilize almost all of the capacity?<sup>59</sup> The underlying policy rationale that provided educators with priority access to dedicated spectrum no longer exists. The best holder of a license to a scarce resource is one who will utilize the license. One educational entity recently encapsulated the irrationality of opening a window for new EBS licensees when it noted, “[e]ducational [i]nstitutions have proven themselves to be the best choice for a holder of this spectrum, as they are most likely to lease excess capacity.”<sup>60</sup> To the contrary, the best holder of new licenses will be commercial broadband operators, who will be able to deploy service to

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<sup>58</sup> *See Notice* ¶ 24.

<sup>59</sup> *See id.* ¶ 40.

<sup>60</sup> *See* Letter from Kelly M. Anderson, President, Amelia Educational Foundation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-120, at 2 (July 20, 2018); *see also* Letter from Dr. Robert Benson, Superintendent, King George County Schools, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-120 (June 3, 2018) (noting that the issuance of new EBS licenses would allow for “leasing of excess capacity to commercial operators who could handle network construction”).

the public without having to lease the spectrum to another entity. The public interest will best be served by elimination of the EBS “middleman” and allowing commercial broadband system operators direct access to the spectrum. As such, the Commission should not open a priority filing period for new EBS licensees to apply for EBS white space.

As noted above, unlicensed and lightly-licensed opportunities have developed for educational institutions to distribute broadband. For example, 5 GHz Wi-Fi and General Authorized Access spectrum in the 3.5 GHz band, which will be available in the Citizens Broadband Radio Service, are just two examples. Educators that perceive a need for their own networks can use these bands for cost-free spectrum, or they can participate in the upcoming 3.5 GHz Priority Access License auction. EBS white space presents a unique opportunity for the Commission to spur broadband deployment in rural areas. That opportunity should not be squandered to advance the interests of the handful of EBS licensees that now claim to want to self-deploy their own networks. Instead of priority windows, the Commission should make the vacant EBS spectrum available to those that will put it to its highest and best use by first rationalizing existing GSAs to the county boundary and then auctioning remaining white spaces without any eligibility restrictions.<sup>61</sup>

Several of the Commission’s proposals related to the priority windows are also problematic. For example, the Commission seeks comment on adopting a “special holding period” on any license acquired in a priority window.<sup>62</sup> Admittedly, such an approach might deter some applicants focused on profiteering (although others might simply be willing to wait

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<sup>61</sup> If the Commission adopts a window for Tribal Nations, only entities that meet the Commission’s definition of a Tribal Nation, and whose Tribal lands are lands where tribal members reside as a group and are not used for purely commercial purposes should be permitted to participate.

<sup>62</sup> Notice ¶ 47.

out the holding period). However, that comes at quite an expense to the public. Banning the lease or sale of licenses for any period of time harkens back to command and control policies that were responsible for underutilization of the band in the first place. Given that the highest and best use of the EBS white space will be for the commercial deployment of broadband networks, requiring new EBS licensees to hold their licenses for a period of time, and/or not to engage in leasing, will merely keep that spectrum underutilized. While the Commission's question in this regard implicitly recognizes the potential for an EBS windfall, the best way to avoid that windfall is to permit the market to operate efficiently with open eligibility from the start.

Likewise, the Commission proposes to apply a 20 percent capacity reservation for educational uses for those new licensees that lease their spectrum.<sup>63</sup> Rather clearly, EBS licensees do not need to reserve that much spectrum to meet their needs – with most educational entities currently leasing 95 percent of their spectrum, it is a pipedream to think that new educational entities will actually utilize 20 percent of their capacity for educational uses. Yet, such a reservation would keep capacity away from commercial operators who could use it to provide commercial services. Simply put, the solution to the potential for a windfall is not to create yet another inefficiency that will likely result in much of that reserved capacity laying fallow or, in some cases, even deterring commercial deployment because insufficient capacity will be available to meet commercial needs. Again, the Commission should refrain from

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<sup>63</sup> *Id.* ¶ 48.

establishing these sorts of command and control rules that so often prove worse than the problem they are designed to solve and instead should auction the spectrum without restriction.<sup>64</sup>

Moreover, these proposals to avoid EBS windfalls set out in the *Notice* will effectively be undermined by the Commission's own proposal to eliminate the conditions designed to avoid EBS profiteering placed on EBS licensees that received new EBS licenses in recent years via a waiver of the Commission imposed filing freeze, such as the restriction on leasing.<sup>65</sup> Eliminating those restrictions makes sense – they sentence the EBS spectrum at issue to underutilization and inefficient use. But if the Commission eliminates the anti-profitteering restrictions on EBS licenses granted by waiver, prospective EBS licensees will no doubt see anti-profitteering restriction on new licenses as likely to have a limited lifespan and disregard them in deciding to apply.

Finally, the Commission is likely mistaken in assuming that there will not be many mutually exclusive EBS white space applications, even if the Commission were to limit the filing window to local educational entities.<sup>66</sup> As was the case in previous EBS windows, commercial interests undoubtedly will drum up applications from educational entities that have no real educational need for spectrum, but are promised future financial rewards. That certainly was the case in the 1980s and 1990s, when the Commission was compelled to adopt a convoluted “point

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<sup>64</sup> See R Street Institute Comments at 9 (“Giving away spectrum to certain groups does not result in its productive use. The very reason for the current proceeding is that previous attempts to do so in this band have failed. The Commission should, therefore, reverse course and rely on the market mechanism rather than doubling down on government design[.]”) (citation omitted).

<sup>65</sup> See *Notice* ¶ 21. See *Kings County Superintendent of Schools*, Memorandum Opinion and Order, 31 FCC Rcd 13281 (WTB 2016). The Commission granted Kings County's waiver request to grant its license of new EBS spectrum, but made the grant subject to conditions the first of which is that Kings County could not lease the spectrum. The Commission is now a mere 18 months later proposing to relieve Kings County and the other EBS licensees that obtained their spectrum via waiver from that condition.

<sup>66</sup> *Notice* ¶¶ 45-46.

system” for resolving EBS mutually exclusive applications and adjudicate a myriad of cases.<sup>67</sup>

In addition, the *Notice*’s proposal to allow EBS entities to file for an unlimited amount of spectrum in each market will undoubtedly result in a greater likelihood of mutually exclusive applications.<sup>68</sup> If a single applicant can apply for all available frequencies in a given market, there are destined to be many overlaps resulting in mutual exclusivity. Once there are mutually exclusive applications for EBS spectrum, the Commission acknowledges that those applications must go to auction pursuant to Section 309(j) of the Communications Act.<sup>69</sup> As has previously been noted, EBS eligible entities are not ideal candidates for an auction, and quite frankly, many may be prohibited by law from participating in an auction.<sup>70</sup> A far better result would be to

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<sup>67</sup> See *ITFS R&O*, 101 F.C.C.2d at 64-72 ¶¶ 65-72 (1985); *Applications of Roxton Independent School District, Sumner, TX*; *Northeast Texas Community College, Mount Pleasant, TX*; *McCuistion Regional Medical Center, Paris, TX*; *St Michael Health Care Center, Texarkana, TX*; *Durant Public Schools, Kenefic, OK For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3, and G4*, Memorandum Opinion and Order, 9 FCC Rcd 7900 (1994); *Hispanic Information And Telecommunications Network, Inc. et al*, Memorandum Opinion and Order, 20 FCC Rcd 5471 (2005); *Applications of School Board of Roanoke County, Roanoke, Virginia*; *American Scholastic TV Programming Foundation, Roanoke, Virginia, For Construction Permit and License in the Instructional Television Fixed Service on Channels D1, D2, D3, and D4*, Memorandum Opinion and Order, 8 FCC Rcd 6273 (1993); *Applications of Blackwell Consolidated Independent School District Roscoe, Texas*; *Rotan Independent School District Snyder, Texas For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3 and G4*, Memorandum Opinion and Order, 10 FCC Rcd 13153 (1995); *Applications of Waelder Independent School District Waelder, TX*; *Flatonia Independent School District Waelder, TX*; *Shiner Independent School District Waelder, TX*; *Luling Independent School District Waelder, TX*; *Moulton Independent School District Gonzales, TX*; *Yoakum Independent School District Gonzales, TX*; *Stockdale Independent School District Gonzales, TX*; *Hallettsville Independent School District Gonzales, TX For Construction Permit and License in the Instructional Television Fixed Service*, Memorandum Opinion and Order, 8 FCC Rcd 976 (1993).

<sup>68</sup> *Notice* ¶ 42.

<sup>69</sup> 47 C.F.R. § 309(j)(i).

<sup>70</sup> See Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 105 n. 225 (Sept. 8, 2003) (“WCA NIA & CTN Comments”) (“It is doubtful whether many public educational entities would be able to participate in an auction for frequencies, either because of legal or financial restrictions. Even if they can compete in an auction, the irony of the competitive bidding process in this context is that funds that otherwise could be put to use to provide education will be used to purchase frequencies.”); Reply Comments of Texas State Technical College, WT Docket 03-66, at 1 (Oct. 22, 2008) (“While TSTC has been interested in expanding the reach of its existing stations into such areas, as a state entity it does not



avoid any of these issues and allow any white spaces remaining to flow to their highest and best use through an open auction.

**VI. OPERATORS THAT HAVE DEPLOYED PURSUANT TO EXISTING EBS RULES SHOULD NOT BE PENALIZED – EXISTING LEASES SHOULD BE GRANDFATHERED.**

EBS lessees who have acted in good faith to deploy commercial broadband service to the public should not be directly or indirectly penalized by this rulemaking – rather, the Commission should support and enhance the continued efforts of these operators. Those who have invested in good faith to lease EBS spectrum, deploy facilities, and bring service to the public should not in any way suffer because the Commission has determined that the EBS regulatory model is no longer viable. As the *Notice* correctly recognizes, with the changes over the past 50 years in how EBS is used, the restrictions imposed on EBS spectrum use and ownership are no longer necessary or appropriate. But the Commission must take care not to throw out the baby with the bathwater. WCA’s members have done yeoman’s service to bring broadband service to the public using the EBS spectrum that is currently licensed, notwithstanding the Commission’s challenging regulatory regime. There is nothing in the record, and nothing in the *Notice*, to suggest that those commercial operators should be penalized (directly or indirectly) for doing exactly what the Commission encouraged them to do. The Commission should take no action in this proceeding that interferes with existing leases or that would modify spectrum allocations to reduce bandwidth or geographic service areas assigned to any 2.5 GHz band licensee or lessee.

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believe it would be able to obtain necessary funding to participate in an auction.”). Additionally, some school districts may not have the legal authority to commit funds in an auction. “[I]n states that follow the Dillon Rule, a local entity typically has only the powers expressly granted to it by the state [and unless] state procurement statutes expressly authorize participation in an auction process, a school district may not be able to get the benefit of an EBS license.” *See* Comments of American Association of School Administrators et al., WT Docket No. 03-66, at 10-11 (Sept. 22, 2008).

WCA agrees with the Commission proposal to grandfather existing leases.<sup>71</sup> The Commission should very clearly state that leases entered into prior to the effective date of any new rules pursuant to this proceeding should continue to be enforceable in the courts according to their terms for the duration of the lease (including any renewal terms).<sup>72</sup> This will provide commercial operators with the certainty that they will continue to receive the benefits of their bargain with EBS licensees and, more importantly, assure that existing commercial broadband services being offered to the public are not compromised by EBS licensees attempting to avoid their contractual obligations to take undue advantage of the new regulatory regime. To do otherwise could undermine not only the Commission's efforts to promote broadband deployments in the 2.5 GHz band, but also the very integrity of the Commission's secondary market system across all services.

**VII. THE COMMISSION SHOULD ADOPT REASONABLE PERFORMANCE AND BUILDOUT REQUIREMENTS THAT PROMOTE 2.5 GHz UTILIZATION.**

Given that the new EBS white space licenses will be located predominantly in rural America, the performance requirements suggested in the *Notice* are far too stringent.<sup>73</sup> The Commission should not impose such rigorous buildout requirements in rural areas where buildout is already difficult, and sometimes cost prohibitive. Instead, the Commission should match the buildout requirements for any new licenses obtained via auction to those requirements that have been imposed on current BRS licenses pursuant to Section 27.14(o) of the

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<sup>71</sup> *Notice* ¶ 21.

<sup>72</sup> Of course, the parties to an existing lease should be free to modify or replace that agreement should they so choose.

<sup>73</sup> *Id.* ¶ 54.

Commission's Rules.<sup>74</sup> That rule requires the licensees that obtain their initial BRS licenses after November 6, 2009 to provide substantial service within four years of the date of the grant of the license.<sup>75</sup> WCA proposes that any new EBS white space license be subject to the same timeline to meet substantial service.

However, no additional buildout requirements should be imposed with respect to the portion of an existing EBS licensee's GSA gained through the rationalization process. Doing so would only add unnecessary complexity to the licensing scheme for the band. The incumbent EBS licensees have all demonstrated substantial service for their existing GSAs, and the logistics of requiring a separate buildout showing for the unusually shaped and often very small expansion areas would be difficult and expensive for licensees and the Commission alike. Instead, WCA proposes that incumbent EBS licensees should be required when filing their next regularly scheduled renewal to comply with the provisions of Section 1.949 of the Commission's Rules for their entire licensed GSA, including any expansion gained from the rationalization process.<sup>76</sup> Applying the existing WRS rule at the time of license renewal will keep regulatory burdens for licensees and the Commission to a reasonable level.<sup>77</sup> However, to avoid undue burdens on

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<sup>74</sup> See 47 C.F.R. § 27.14(o).

<sup>75</sup> *Id.*

<sup>76</sup> See *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, Second Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 8874, 8883-84 ¶ 21, 8888 ¶ 31 ("WRS Order"). Incumbent licensee's would make a filing of substantial service for the entire rationalized service areas four years after the effective date of the new rules, similar to the filings made by BRS and EBS licensees in 2011. See *Guidance To Broadband Radio Service And Educational Broadband Service Licensees On Complying With Requirement To Demonstrate Substantial Service By May 1, 2011*, Public Notice, 26 FCC Rcd 2152 (WTB 2011).

<sup>77</sup> *WRS Order*, 32 FCC Rcd at 8888 ¶ 31. "We find that our renewal framework strikes an appropriate balance between our need for information to fully evaluate renewal applications that cannot meet our safe harbors and minimizing burdens on licensees." *Id.* at 8888-89 ¶ 33.

incumbent EBS licensees whose licenses expire within four years of the effective date of the rules adopted in this proceeding, those licensees should not be required to make any showing or certify to any buildout regarding the expansion areas until four years after the effective date of any new rules.

Additionally, WCA agrees with Commission that it should apply the standard WRS rules for permanent discontinuance and renewal to all 2.5 GHz licensed spectrum, incumbent EBS licenses and any new EBS licenses issued pursuant to this rulemaking.<sup>78</sup> Those rules already apply to BRS licenses, and that band has a track record of extensive use in the period since the Commission modified its rules to promote commercial broadband deployments. Having a consistent regulatory structure for the 2.5 GHz band will avoid confusion and provide an appropriate level of regulatory consistency for spectrum that will be effectively indistinguishable.

#### **VIII. AN INCENTIVE AUCTION WOULD DO MORE HARM THAN GOOD AND IS NOT THE BEST MECHANISM TO ACHIEVE THE COMMISSION'S GOALS.**

The Commission seeks comment on whether it should repurpose EBS spectrum via an incentive auction in order to provide incentives for incumbents to make underutilized spectrum available for commercial use.<sup>79</sup> The Commission's goal of putting the EBS spectrum to its highest and best use cannot be achieved through an incentive auction. While an incentive auction can be beneficial in certain circumstances by providing a voluntary, flexible market-based approach that matches supply with demand – an incentive auction would be wholly inappropriate in the EBS context and is unnecessary to accomplish that goal.

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<sup>78</sup> Notice ¶ 55.

<sup>79</sup> *Id.* ¶ 61.

First, any type of incentive auction would inevitably fail because the vast majority of EBS spectrum is subject to long-term leases that, as a practical matter, would effectively preclude most EBS licensees from participating.<sup>80</sup> For example, it is common for EBS leases to include rights of first refusal (“ROFR”) and similar provisions that provide the commercial system operator with various rights that become effective when the EBS licensee expresses an interest in the assignment of its license. While these provisions may vary in their particulars from agreement to agreement, it is fair to say that these provisions are essential to providing the commercial operator with the certainty of continued spectrum access it needed to invest in the deployment of the commercial broadband system. And, it is equally fair to say that these EBS lease provisions effectively prevent the EBS licensee from contributing its spectrum to an incentive auction, as the EBS licensee participating in an incentive auction would then be unable to give the current lessee its contractual right to match the best offer achieved in the incentive auction or otherwise meeting its contractual obligations.<sup>81</sup>

Second, an EBS incentive auction would present an undue complexity because, unlike the 600 MHz band auctioned in the Broadcast Incentive Auction, not all EBS spectrum is fungible. For example, the G1-3 channels are far more valuable to a commercial operator that already is licensed to the E and F group BRS spectrum than a lower band channel (A, B, C, or D Groups)

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<sup>80</sup> As WCA, NIA, and CTN indicated in comments in 2003, when the Commission was considering an incentive auction, “[t]he Commission cannot as a matter of law and should not as a matter of policy interfere with existing leases.” WCA NIA & CTN Comments at 109.

<sup>81</sup> As WCA has set forth herein, it is imperative that the Commission honor the existing leases and the provisions of those leases. If the Commission truly is interested in maintaining its robust secondary market for spectrum, it should not in this proceeding take any action that suggests licensees or lessees can escape from their spectrum leases through a Commission-conducted incentive auction. To do so would have wide-ranging implications not only in this proceeding, but would cast a pall over the Commission’s efforts more generally to promote secondary market lease transactions as a vehicle for improving utilization of spectrum.

because the G1-3 channels are immediately adjacent to the Upper Band Segment BRS channels. Acquisition of the G Group channels would provide an operator licensed to all the BRS spectrum a 88 megahertz contiguous block of spectrum, whereas, the Lower Band Channels or Middle Band channels are not immediately contiguous with the licensed BRS Upper Band channels and thus less desirable. WCA's proposal for grouping the EBS white space spectrum, discussed above, creates three different sized licenses, but those licenses are carefully designed to allow commercial operators to secure the specific spectrum they need, without having to acquire spectrum that they do not need.

Third, an incentive auction would be a one-time event, forcing EBS licensees to choose at a single point in time whether they are currently prepared to assign their authorizations. One significant benefit of the non-incentive auction approach WCA advocates is that it would allow educators to determine at what point it makes sense, given their educational needs and the availability of alternative distribution mechanisms, to sell their EBS licensed spectrum, and on what terms. This flexibility is far preferable to a Commission mandated timeline that may not meet the needs of every EBS licensee.

Finally, an incentive auction is best utilized where there is a need for the Commission to organize the market and match the demand of buyers with the supply from sellers. For example, in the Broadcast Incentive Auction, the Commission explained that the purpose of the auction was to "identify broadcasters willing to relinquish . . . in order to clear a stage-specific spectrum clearing target."<sup>82</sup> In the case of EBS spectrum, however, the market has worked efficiently since the Commission's 1983 decision permitting leasing, and there is no reason to believe that

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<sup>82</sup> *Comment Sought On Competitive Bidding Procedures For Broadcast Incentive Auction 1000, Including Auctions 1001 And 1002*, Public Notice, 29 FCC Rcd 15750, 15776 ¶ 71(2014) (citation omitted).

the market will become less efficient with the rule changes contemplated by the *Notice*. Simply put, licensees and commercial operators have had no trouble finding each other and negotiating beneficial arrangements, and there is no need for the Commission to impose the costs and delays that would inevitably accompany an incentive auction. Providing existing EBS licensees with the flexibility to assign their licenses, free from educational restrictions, provides a market-based, voluntary approach that will lead to the spectrum being put to its highest and best use.

Ultimately, an incentive auction would not provide any benefits beyond what would be realized by allowing licensees to sell and lease directly to commercial operators, which can be achieved much more quickly and with lower administrative costs than a Commission-mandated auction. The Commission should free EBS from obsolete restrictions and let the market work without interference. EBS licensees have been able to readily find commercial leasing partners under the existing system, and there is no reason to believe that those desiring to sell their licenses require the Commission to intervene in the marketplace to find willing buyers.

## **CONCLUSION.**

As the Commission moves forward in this proceeding, it should be guided by the three principles set forth above, (1) the highest and best use of the 2.5 GHz band today is for the provision of commercial broadband, (2) the market functions best when licensees and lessors have flexibility, and (3) those who are using leased EBS spectrum to provide commercial broadband service should not be penalized because of the inefficiencies of the current regime. WCA looks forward to working with the Commission as it updates the 2.5 GHz band to meet the needs of operators today and to open the spectrum to its highest and best use.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS  
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